



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AO84

Specially Adapted Housing Eligibility for Amyotrophic Lateral Sclerosis

Beneficiaries

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulation regarding specially adapted housing (SAH). The amendment authorizes automatic issuance of a certificate of eligibility for SAH to all veterans and active servicemembers with service-connected amyotrophic lateral sclerosis (ALS) rated totally disabling under the VA Schedule for Rating Disabilities. The intent and effect of this amendment are to establish eligibility for SAH for all persons who have service-connected ALS. VA previously amended its Schedule for Rating Disabilities to assign a 100-percent disability evaluation for any veteran who has service-connected ALS based on the recognition that ALS is a rapidly progressive, totally debilitating, and irreversible motor neuron disease that results in muscle weakness leading to a wide range of serious disabilities, including problems with mobility. Because individuals with ALS quickly reach a level of total disability, the change was designed to eliminate the need to repeatedly reevaluate veterans suffering from ALS over a short period of time as symptoms worsen.

Based on that same rationale, this amendment addresses the corresponding eligibility for SAH benefits for veterans and servicemembers with service-connected ALS. The overall SAH grant approval and oversight process is complex and lengthy, with many parts beyond VA's control. This rulemaking streamlines one aspect of the process within VA's control, by establishing SAH eligibility for all veterans or servicemembers with service-connected, totally disabling ALS. By shortening the first stage of the SAH process, this regulatory change will assist veterans and servicemembers suffering from ALS in adapting their homes before their condition becomes too debilitating. It will also lengthen the period during which ALS-afflicted veterans and servicemembers will be able to utilize the core SAH benefits. VA also makes non-substantive technical amendments for clarity.

DATES: Effective Date: This interim final rule is effective [insert date of publication in the FEDERAL REGISTER].

Comment Date: Comments must be received by VA on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

Applicability Date: The provisions of this regulatory amendment apply to all applications for SAH pending before VA on or received after [insert date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to Director, Regulation Policy and

Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AO84 – Specially Adapted Housing Eligibility for Amyotrophic Lateral Sclerosis Beneficiaries.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

FOR FURTHER INFORMATION CONTACT: Stephanie Caucutt Li, Section Chief, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on December 20, 2011 (76 FR 78823), VA amended its regulations pertaining to the percent disability evaluation assignable for service-connected ALS. As of January 19, 2012, the effective date of that amendment, 38 CFR 4.124a, diagnostic code 8017, provides a 100-percent disability evaluation for any veteran who has service-connected ALS. VA determined that assigning a

100-percent evaluation in all cases eliminates the need to unnecessarily reevaluate veterans with ALS repeatedly over a short period of time as the condition worsens and inevitably progresses to total disability. The change was necessary to adequately compensate veterans who suffer from this progressive, untreatable, and fatal disease. However, the change did not specifically address corresponding eligibility for SAH benefits.

Section 2101(a)(1), title 38, United States Code (U.S.C.), authorizes the award of SAH to veterans who are entitled to disability compensation for a “permanent and total service-connected disability” meeting any of the criteria specified in section 2101(a)(2)(B). Section 2101A(a) of title 38, U.S.C., authorizes VA to provide the same assistance to a member of the Armed Forces serving on active duty who is suffering from a disability meeting the same requirements if the disability was incurred or aggravated in line of duty in active service, which is to say that the disability is service connected.

Among the specified criteria the disability must meet are the following:

(1) being due to loss of use of both lower extremities such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair; (2) being due to loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair; (3) being due to loss of use of one lower extremity together with the loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

and (4) being due to the loss of use of both upper extremities such as to preclude use of the arms at or above the elbows. VA's SAH adjudication regulations, 38 CFR 3.809(b), which were promulgated to implement sections 2101(a) and 2101A(a), include these four SAH eligibility criteria regarding loss of use of extremities.

Because ALS is a rapidly progressive, totally debilitating, and irreversible disease, VA has determined that progression of ALS will routinely, and quickly, satisfy these existing SAH eligibility criteria. This interim final rule permits VA to determine SAH eligibility as soon as a veteran or servicemember establishes service connection for ALS, eliminating the need for additional development and reducing wait times. By streamlining the eligibility process, this regulatory amendment will allow veterans and servicemembers with service-connected ALS to receive and utilize to maximum advantage the SAH benefit, without unnecessary delay.

From the standpoint of SAH qualification procedures, the effect of this regulatory amendment is to allocate resources most efficiently and ensure a better lifestyle for veterans and servicemembers with service-connected ALS who want to adapt their homes so they can remain in them for as long as possible. In this regard, one major patient or caretaker decision concerning ALS—the implementation of tracheotomy and assisted ventilation—can in many instances leave the patient homebound. Veterans and servicemembers who experience slower progression of ALS can be managed at home with extensive home care. Thus, there exists an immediate need for VA to focus this regulatory

change upon the SAH certificate of eligibility process and timeframe. Because the prognosis of the progression of ALS is typically established after a brief period of observation, in most cases less than 3 months, VA has determined that it is fair and reasonable to provide a certificate of eligibility for SAH upon determination of service connection for ALS.

VA's Loan Guaranty Service continues to identify and implement process improvements to the SAH program, while also recognizing the impact an expedited rating will have on reducing the grant processing timeline. Pursuant to the authority granted in 38 U.S.C. 2101(a)-(c), the Secretary has established in 38 CFR 36.4405 a two-phase approval process for the SAH program, a conditional approval and a final approval. Due to the complex and variable nature of the SAH grant, the process for overall approval can take as little as 6 months, but in rare instances, as long as 1 year, and the time to actually complete the construction of the adaptation can consume an additional 6 months.

For conditional approval, the Secretary must determine that the veteran and the home meet the disability, suitability, and feasibility requirements of the SAH program, and that the veteran has not exceeded the program's applicable dollar and usage limitations. 38 CFR 36.4405(a)(1). If these conditional requirements are met, the Secretary can then authorize pre-construction costs, to include architectural services, land surveys, and legal fees. 38 CFR 36.4405(a)(2). Final grant approval is contingent on the approval of property plans and specifications, the verification of ownership of the property, the submission of certifications regarding any future sale or rental of the property, the

showing that flood insurance has been obtained, and the compliance with certain geographical limits. 38 CFR 36.4405(b)(2). This approval process varies from case to case, as each eligible person may choose the project type, location, contractor, and architect, and each home may require specific unique adaptations to meet the person's needs.

Following grant approval, VA continues its oversight of the grant disbursement until each project is completed, by establishing escrow accounts, reviewing local and state building permits, and ensuring that compliance inspections meet local, state, and Federal building requirements along with VA minimum property requirements. The overall process from eligibility determination to occupancy of the home adapted to meet the person's specific requirements can take from 12 to 18 months, absent this rulemaking.

As stated above, therefore, in order to ensure that an eligible person can take advantage of this benefit to live independently as quickly as possible, an expeditious SAH eligibility determination is both critical and essential. Since the SAH event cycle is largely variable and reliant on factors beyond the control of VA, but ALS implications are known and unique, VA is regulating an arena that VA does control, that is, reducing the certification timeframes with regard to SAH claimants with service-connected ALS.

VA, therefore, intends to establish SAH eligibility for all persons with service-connected ALS rated as totally disabling. VA is doing so by adding a new provision to 38 CFR 3.809, which governs eligibility for SAH under 38 U.S.C. 2101(a) or 2101A(a). The new regulation adds the following sole criterion for

ALS claimants, as an alternative to the previously listed criteria: the veteran or member of the Armed Forces serving on active duty has service-connected ALS rated 100-percent disabling under diagnostic code 8017 of 38 CFR 4.124a. By satisfying this added sole criterion, an ALS veteran or servicemember becomes eligible for the SAH grant, without further development and delay. VA incorporates this new category of criteria in § 3.809 as new paragraph (d).

VA is also reorganizing § 3.809 for ease of readability and clarity. First, VA is retitling § 3.809 to reflect that § 3.809 applies to a veteran or a member of the Armed Forces serving on active duty who is eligible for SAH benefits under 38 U.S.C. 2101(a)(2)(A)(i) but not those who are eligible under 38 U.S.C. 2101(a)(2)(A)(ii). On August 6, 2012, Congress provided temporary eligibility for SAH benefits to a veteran who served in the Armed Forces on or after September 11, 2001, if the veteran is entitled to compensation under chapter 11 of title 38 for a permanent service-connected disability meeting certain criteria. 38 U.S.C. 2101(a)(2)(A)(ii); Andrew Connolly Veterans Housing Act, Public Law 112-154, § 202, 126 Stat. 1176 (2012). Section 3.809 does not address those veterans. VA has been relying on the statute to provide SAH benefits to those veterans. Second, VA is amending the introductory text to § 3.809. Third, VA is removing current § 3.809(a) because its content is outdated and unnecessary. Fourth, VA is redesignating current § 3.809(b) as new § 3.809(a) with the exception of the last phrase and revising the heading to match its contents. Fifth, VA is rewording the last phrase of current § 3.809(b) in new § 3.809(b). Sixth, VA also makes four non-substantive technical amendments for purposes of



clarity, by removing two erroneously placed periods at the conclusion of current § 3.809(b)(3) and (b)(4), removing two extraneous commas in current § 3.809(b)(1), removing “or” at the end of current § 3.809(b)(1)-(4), and removing the quotation marks from the title of § 3.809(c). Finally, in promulgating this rule, VA relies on its general authority granted under 38 U.S.C. 501(a)(1) to prescribe regulations to carry out the laws administered by VA, including those concerning the nature and extent of proof and evidence in order to establish the right to benefits. Therefore, VA is updating the authority citation to § 3.809 to refer to section 501(a). VA makes these formatting changes in order to incorporate the new ALS criterion in the clearest manner.

#### Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), we find that there is good cause to dispense with advance public notice and opportunity to comment on this rule and good cause to publish this rule with an immediate effective date. This interim final rule is necessary to implement immediately the Secretary's decision to establish SAH eligibility for all persons with totally-disabling service-connected ALS. Delay in the implementation of this rule would be impracticable and contrary to the public interest, particularly to veterans and servicemembers.

Because the survival period for persons suffering from ALS is generally 18-48 months or less from the onset of symptoms, any delay in establishing SAH eligibility is extremely detrimental to veterans and servicemembers who are currently afflicted with ALS. Any delay in implementation until after a public-

comment period could delay modifying the regulated certificate of eligibility process, depriving ALS veterans and servicemembers of quick and efficient access to SAH benefits.

The other revisions and minor punctuation changes made by this rule are technical corrections that merely remove unnecessary and potentially unclear language and punctuation. The substantive rights and duties of all parties affected by these changes have not been altered. Advance public notice and opportunity to comment on such changes is unnecessary under 5 U.S.C. 553(b)(B), and because of their nonsubstantive nature, we find good cause to publish these changes with an immediate effective date.

For the foregoing reasons, the Secretary is issuing this rule as an interim final rule with immediate effect.

#### Paperwork Reduction Act

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This interim final rule will not affect any small entities. Only VA beneficiaries will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this interim final rule is exempt from the

initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this interim final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Orders 12866 and 13563. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www1.va.gov/orpm/>, by following the link for "VA Regulations Published."

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.106, Specially Adapted Housing for Disabled Veterans and 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on November 7, 2013, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: November 26, 2013

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Robert C. McFetridge  
Director, Regulation Policy and Management  
Office of the General Counsel,  
Department of Veterans Affairs.

For the reasons set out in the preamble, VA is amending 38 CFR part 3 as follows:

## PART 3—Adjudication

### Subpart A—Pension, Compensation, and Dependency and Indemnity

#### Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Revise § 3.809 to read as follows:

#### § 3.809 Specially adapted housing under 38 U.S.C. 2101(a)(2)(A)(i).

In order for a certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a)(2)(A)(i) or 2101A(a) to be extended to a veteran or a member of the Armed Forces serving on active duty, the following requirements must be met:

(a) General. A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total.

(b) Disability. The disability must be due to:

(1) The loss or loss of use of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity,

(3) The loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(4) The loss or loss of use of one lower extremity together with the loss or loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(5) The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow, or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

(c) Preclude locomotion. This term means the necessity for regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible.

(d) Amyotrophic lateral sclerosis. VA considers § 3.809(b) satisfied if the veteran or member of the Armed Forces serving on active duty has service-



connected amyotrophic lateral sclerosis rated 100 percent disabling under 38 CFR 4.124a, diagnostic code 8017.

(Authority: 38 U.S.C. 501(a), 1151(c)(1), 2101, 2101A)

CROSS REFERENCE: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

[FR Doc. 2013-28831 Filed 12/02/2013 at 8:45 am; Publication Date: 12/03/2013]